

FRANK HUBBARD

IBLA 95-151

Decided July 13, 1998

Appeal from a determination of the Assistant Director, Field Operations, Office of Surface Mining Reclamation and Enforcement, declining to take enforcement action in response to a citizen's complaint. TDN 93-130-289-7.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Citizen's Complaints:
Generally—Surface Mining Control and Reclamation Act of 1977: Permanent
Regulatory Program: Generally

An OSM decision on informal review upholding a determination that state regulatory authority had shown good cause for not taking enforcement action in response to a 10-day notice of a citizen's complaint charging that slopes were too steep and that a slide existed on the permit will be affirmed on appeal where state's findings that slide had been stabilized through state enforcement action and reclaimed slopes conformed with angles approved in permit are supported by the record, including OSM oversight inspection, and appellant presents no evidence on appeal to the contrary.

APPEARANCES: Frank Hubbard, pro se; John P. Coleman, Jr., Esq., Office of the Solicitor, U.S. Department of the Interior, Knoxville Field Office, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Frank Hubbard has appealed a determination of the Assistant Director, Field Operations, Office of Surface Mining Reclamation and Enforcement (OSM), issued on February 8, 1994, declining to take enforcement action in response to Hubbard's citizen's complaint filed pursuant to the provisions of section 521(a) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1271(a)(1) (1994). The Assistant Director's decision

was issued in response to Hubbard's request for informal review of a determination by OSM's Big Stone Gap Field Office (BSGFO) that the Virginia Division of Mined Land Reclamation (DMLR) had taken appropriate action in response to Ten-Day Notice (TDN) 93-130-289-7.

On June 3, 1993, TDN 93-130-289-7 was issued by BSGFO in response to a citizen's complaint filed by Hubbard on June 1, asserting that a slide had occurred in a backfilled area within Permit No. 1101061 held by Strouth Coal Co. CVC (Strouth) and further alleging that enforcement action thus far taken by DMLR had not resulted in correction of the problem. The complaint requested OSM to "take over" enforcement because "the State has been dragging its feet on this matter." Five days later, BSGFO issued a second TDN (93-130-289-8) in response to a June 3 submission by Hubbard, which OSM treated as an addendum to the first complaint. In this June 3 filing, Hubbard, while reiterating his concern with the slide, also raised issues relating to the asserted failure of Strouth to return the mined land to its approximate original contour (AOC), the failure to properly construct and maintain a road which had been retained as part of the approved post-mining land use, and the failure to minimize disturbance to the hydrologic balance with respect to discharges from underground mine workings.

On June 15, 1993, DMLR responded to TDN 93-130-289-7. In this response, DMLR noted that Hubbard had previously filed a complaint about the slide with DMLR on March 1, 1993, and that, in response to this complaint, DMLR issued notice of violation #93-67-6 to Strouth on March 3, 1993, charging, *inter alia*, that Strouth was in violation of the Virginia Coal Surface Mining Reclamation Regulations. The notice of violation required the operator to take whatever measures were necessary to stabilize the backfilled area and set an original abatement date of April 12, 1993. ^{1/} While an appeal by Strouth to the DMLR Compliance Manager was subsequently disallowed, the time for abatement was subsequently extended to May 28, 1993, owing to "wet weather." On June 7, 1993, a complete inspection was conducted by Norman Enix of DMLR. The inspection report which he submitted indicated that the NOV was being terminated because the slide area had stabilized and the operator had reseeded some bare areas on the site. ^{2/}

^{1/} This NOV also cited Strouth for failing to submit water monitoring reports as required by the Virginia Coal Surface Mining Regulations. This issue is not involved in the instant appeal.

^{2/} On June 15, 1993, DMLR responded to TDN 93-130-289-8, and informed OSM that it was declining to take any enforcement action with respect thereto. DMLR explained the reasons for its failure to take action by noting that the road was, in fact, in excellent shape, that DMLR's inspection found no violation of AOC requirements, and that there were no old mine workings in the area so that there was no substantiation of Hubbard's claim that a violation of the requirement to minimize disturbance to the hydrologic balance existed because of a failure to direct a discharge around or through the backfill area.

Prior to determining the appropriateness of DMLR's response, Bill Arnett, BSGFO reclamation specialist, conducted a complete inspection of the Strouth permit on July 1, 1993, accompanied by Enix and Hubbard. Arnett's observations and conclusions are contained in a report captioned "Narrative For Minesite Evaluation Report" (Minesite Report). With reference to TDN 93-130-289-7, the Minesite Report first recapitulated the actions taken by DMLR to deal with the complaint:

The complainant alleged that a slide had developed in the backfill and enforcement action taken by DMLR had not resulted in correction of the problem. The DMLR response to this Notice, dated 6/14/93, indicates that DMLR Notice of Violation 93-67-3 was served on 3/2/93, to stabilize the slide in the backfill by 4/12/93. On 4/16/93, the abatement date was extended to 5/28/93, due to wet weather. The operator ditched the water away from the toe of the slide area and seeded the slide area to stabilize it. The Notice was terminated on 6/7/93.

(Minesite Report at 4.) The Minesite Report then discussed the facts disclosed and the conclusions reached based on Arnett's field investigation:

The slide area is located in the top of the backfill above an access road in the northern part of the permit. * * * The slide area is approximately 225 feet long and appears to be an area that was partially shaved at the top of the highwall to eliminate the highwall. Some settlement cracks in the backfill were observed which have re-exposed the top of the highwall in two places. The re-exposed highwall was estimated to range in size from 2-4.5 feet high by 20-35 feet long. The backfill has a vegetative ground cover. Surface drainage from the upper portion of the access road is directed away from the toe of the backfill by the access road inner ditchline. The access road inner ditchline is directed into diversion D-5. According to Inspector Enix, the toe of the backfill had been saturated and to dry out the area the surface drainage from the upper part of the access road was directed around the area by the road ditchline. DMLR policy requires the re-exposed highwall to be recovered prior to final bond release. DMLR took enforcement action to require the slide problem to be stabilized within the allowed 90 day time period, and the backfill appears to be stable at this time; therefore, DMLR's response is considered appropriate.

Id. at 4-5. The Minesite Report also examined DMLR's response to TDN 93- 130-289-8 and concluded that DMLR's response with respect to the matters involved therein was appropriate. Id. at 5-6.

Based on this examination, BSGFO found DMLR's responses to the TDN's to be appropriate and, by letter dated August 11, 1993, informed Hubbard that no further action by OSM would be taken on either of the TDN's. Hubbard was also advised of his right to seek informal review of this determination by the OSM Assistant Director for Field Operations.

Hubbard then sought informal review. In his request for informal review, Hubbard complained that, although the state inspector had originally issued a notice of violation for the slide, he "then changed his mind and terminated [the] violation." While acknowledging that OSM conducted its own field inspection on July 1, 1993, which he attended and which ultimately resulted in the OSM finding that the DMLR response was appropriate, he asserted that "this slide was not corrected and is a disgrace to both federal and state reclamation laws." Hubbard urged OSM to conduct another site inspection with an inspector from another area, contending that "the OSM office in Big Stone was not fair in their decision." (Request for Informal Review at 1-2.)

On February 8, 1994, the Assistant Director upheld BSGFO's determination that DMLR had taken appropriate action in response to TDN 93-130- 289-7. Noting that an OSM inspection had determined that the area in question had been stabilized, the Assistant Director advised Hubbard that a file review indicated that "[t]he area had been backfilled in a manner consistent with the approved permit, and slope measurements recorded at the time of the Field Office site visit indicate that backfill configuration approximates final surface contours approved in the permit." ^{3/} (Assistant Director's Decision at 1.) Accordingly, he affirmed the BSGFO decision. Hubbard thereupon pursued an appeal to this Board pursuant to 43 C.F.R. § 4.1281.

On appeal, Hubbard maintains that "the slide is still there" and "all the state inspector did was require the mining company to scatter some Locust tree seeds," which, he continues, died in the summer's drought. He contends the "only ditches dug were done by myself along a road leading to the cemetery" and that no water was ditched from the toe of the slope. He also claims that the land was not restored to AOC and that the backfill continues to slide after heavy rains. Noting that his parents are buried on the hill he complains that "it is a disgrace for people to have to pass by this." (Statement of Reasons at 1-2.)

[1] At the outset, we note that under section 503 of SMCRA, 30 U.S.C. § 1253 (1994), states with approved programs have the primary responsibility for enforcing the Act within each state. However, notwithstanding the fact that a state may have been granted primary enforcement authority, OSM retains a significant oversight role to ensure compliance with SMCRA's mandates. Thus, where, pursuant to a citizen's complaint, OSM has reason to believe that a permittee is in violation of a state regulatory program,

^{3/} The Assistant Director also pointed out that, while subsequent examinations had identified a portion of the highwall had been re-exposed due to backfill settlement which would require remedial action before bond release, this matter had been the subject of a separate TDN issued by OSM to DMLR on Jan. 31, 1994, and that the State's response was presently under review by BSGFO.

OSM is required to issue a TDN to the appropriate state regulatory authority. See 30 U.S.C. § 1271(a)(1) (1994); 30 C.F.R. § 842.11(b)(1). Under the applicable regulations, unless the state takes "appropriate action" to cause the violation to be corrected or shows "good cause for the failure to do so" within 10 days of receiving the TDN, OSM is required to conduct an immediate Federal inspection of the surface coal mining operation. See 30 U.S.C. § 1271(a)(1) (1994); 30 C.F.R. § 842.11(b)(1)(ii)(B)(1); Ernest Back, 135 IBLA 246, 248 (1996); Ambleside, Ltd., 135 IBLA 51, 57 (1996).

The applicable regulations further provide that "appropriate action" includes "enforcement or other action authorized under the State program to cause the violation to be corrected" (30 C.F.R. § 842.11(b)(1)(ii)(B)(3)), and also list five situations which are considered to constitute "good cause" for a failure to take enforcement action. See 30 C.F.R. § 842.11(b)(1)(ii)(B)(4); see also Morgan Farm, Inc., 141 IBLA 95, 100 (1997); Harvey Catron, 134 IBLA 244, 255 (1995), aff'd, No. 96-0001-BSG (W.D. Va. Mar. 5, 1997), appeal filed, No. 97-1449 (4th Cir. Mar. 28, 1997); Ambleside, Ltd., supra, at 58.

Moreover, we must note that, under 30 C.F.R. § 842.11(b)(1)(ii)(B)(2), where OSM has declined to take enforcement action pursuant to a citizen's complaint because it finds that the state regulatory authority's response was appropriate, any party seeking to challenge such a finding must establish, by a preponderance of the evidence, that the state regulatory authority's actions or response to a TDN was arbitrary, capricious, or an abuse of discretion. See Morgan Farm, Inc., supra, at 100; Betty L. & Moses Tennant, 135 IBLA 217, 227 (1996); Pittsburgh & Midway Coal Mining Co. v. OSM, 132 IBLA 59, 74, 102 I.D. 1, 9 (1995). ^{4/}

In the instant case, OSM found that DMLR's response was appropriate. For its part, DMLR had originally issued an NOV directing Strouth to take whatever action was necessary to stabilize the slide. It subsequently terminated this NOV after it determined that the slide had been stabilized. Subsequently, BSGFO Inspector Bill Arnett independently reviewed the concerns raised in Hubbard's citizen's complaint in his July 1, 1993, inspection. See Minesite Report. Having actively exercised its oversight responsibility, the issue to be resolved is whether OSM properly determined the slide had been stabilized. Peter J. Rosati, 119 IBLA 219, 223 (1991). We are unable in this case to conclude that Hubbard has sustained his burden of establishing error in OSM's decision or that DMLR's decision was arbitrary, capricious, or an abuse of discretion.

^{4/} We note that these regulations were upheld against a challenge brought by the National Coal Association. The United States District Court for the District of Columbia concluded that the TDN regulations "are not arbitrary, capricious, or otherwise inconsistent with law. Rather they are based upon a permissible interpretation of SMCRA." National Coal Association v. Uram, No. 87-2076 (D.D.C. Sept. 16, 1994), at 19. See Pittsburgh & Midway Coal Mining Co. v. OSM, supra, at 75.

Hubbard's claim that the slide still exists is controverted by the DMLR inspection report of June 7, 1993, and BSGFO's inspection report of July 1, 1993. Both reports of inspection found the slide area was stable and that the land was restored to AOC. The slope angles also conformed with those approved in Strouth's permit. While he has disputed them, Hubbard has submitted no evidence on appeal contravening DMLR and BSGFO's findings. It is incumbent on Hubbard, as the party challenging the OSM decision, to affirmatively establish the factual predicates of his claim. This, he failed to do. 5/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

James L. Burski
Administrative Judge

I concur.

T. Britt Price
Administrative Judge

5/ To the extent that Hubbard's assertions on appeal could be construed as an argument that DMLR was required to issue an NOV requiring Strouth to backfill the re-exposed highwall at the present time, we must point out that Strouth did not pursue this argument before the Assistant Director. As we noted in Betty L. and Moses Tennant, supra, at 226-27, only issues pursued below may be raised in an appeal to this Board. Therefore, to the extent that Hubbard failed to raise the issues involved in TDN 93-130-289-8 in his request for informal review, he is precluded from relitigating those matters before the Board.

In any event, we note that in Peter J. Rosati, supra, at 224, the Board held that, insofar as AOC is concerned, "the only requirement [in SMCRA] is that, at the conclusion of backfilling and grading, the disturbed areas should closely resemble the general surface configuration of the land prior to mining and blend into and complement the drainage pattern of the surrounding terrain." 30 U.S.C. § 1291(2) (1988). Hubbard does not dispute that the highwall was reclaimed at the conclusion of backfilling and grading or that DMLR policy requires highwalls re-exposed by backfill settlement to be eliminated prior to final bond release, which, in fact, it clearly intends to require.

